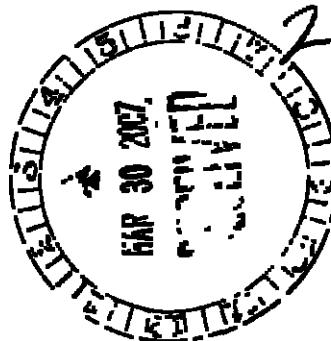


CHARLES H. MONTANGE
ATTORNEY AT LAW
416 NW 16TH STREET
SEATTLE, WASHINGTON 98107
206 461 1936
FAX 206 461 3119

29 March 2007
by express



Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423-0001

Re: PYCO Industries -- Alternative Service -- South
Plains Switching, Ltd., F.D. 34889;

PYCO Industries -- Feeder Line Development --
South Plains Switching, Ltd., F.D. 34890;

Hanson Aggregates -- Alternative Service --
South Plains Switching, Ltd., F.D. 34985

PYCO Opposition to SAW Petition filed March 14
for Leave to File Reply to Reply

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of an Opposition on behalf of PYCO Industries with respect to the South Plains Switching Ltd.'s (SAW's) Petition for Leave to File the Reply Verified Statement of Shad Wisener in Reply to the Reply of PYCO Industries, Inc. filed March 7, 2007. Replies to replies are barred by 49 C.F.R. § 1114.13(c). The rationale SAW supplies for granting leave to file supports rejection. The Reply Statement is also defective for the reasons stated in the attached.

Thank you for your assistance.

Very truly,


Charles H. Montange
for PYCO Industries, Inc.

ENTERED
Office of Proceedings

MAR 30 2007

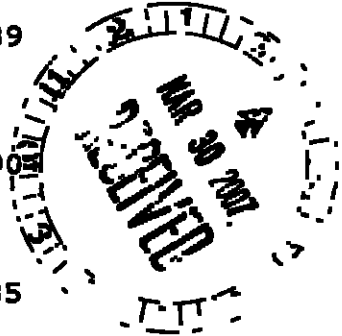
Part of
Public Record

Encls.

cc. counsel per certificate of service (w/encl.)
Mr. McLaren (for PYCO) (w/encl.)

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --)	
ALTERNATIVE RAIL SERVICE --)	F.D. 34889
SOUTH PLAINS SWITCHING LTD.)	
PYCO INDUSTRIES, INC. --)	
FEEDER LINE APPLICATION --)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.)	
HANSON AGGREGATES --)	
ALTERNATIVE RAIL SERVICE --)	F.D. 34985
SOUTH PLAINS SWITCHING LTD.)	



OPPOSITION
by PYCO INDUSTRIES, INC.
to
South Plains Switching Ltd.'s
"Petition for Leave to File the Reply
Verified Statement of Shad Wisener
in Reply to the Reply of
PYCO Industries, Inc. filed March 7, 2007

PYCO Industries, Inc., opposes South Plains Switching, Ltd.'s (SAW's) petition (filed March 14) for leave to file the Shad Wisener statement as a reply to a reply.

Background

On February 15, 2006, SAW filed an "emergency petition" to alter the service protocol governing alternative rail service in Finance Docket 34889 (alternative service under Part 1147 for PYCO). PYCO filed a Reply as permitted by the Board's rules on March 7, 2007. SAW's petition to file the Shad Wisener statement as a reply to a reply followed.

Argument

1. Section 1114.13(c) bars SAW's pleading. SAW now invokes 49 C.F.R. Part 1117 (petitions for relief not otherwise provided) to seek leave to file a reply to PYCO's reply. 49

C.F.R. § 1114.13(c) states that a reply to a reply is not permitted. Part 1117 is not a general override of this Board's procedural requirements and deadlines. SAW's request for leave to file a reply to a reply should thus be denied.

SAW argues that section 1114.13(c) is "honored in the breach" and that "acceptance" of another SAW reply to a reply is "hardly earth-shaking in comparison to the fundamental unfairness" SAW claims it has sustained by reason of delays in a decision on the pending feeder line applications (FLA's).

Continued filing of replies to replies prolongs the proceedings and results in the delays that SAW claims are fundamentally unfair to it. SAW's argument for leave is thus an argument to refuse it. In order to allow this Board to digest the record, the record must be closed. SAW's own actions are the very cause of the malaise it then decries, both at this Board and among Lubbock shippers.

2. The proposed statement in any event is incompetent, and not reliable or probative. SAW's motion proposes to introduce a statement by Shad Wisener into the record. To be admissible, his testimony must be "competent." That means the proponent of the testimony either must actually know the fact from personal observation, or if an opinion is involved, must have special expertise or experience on which to render an opinion.¹ Evidence must be competent in order to be probative and

¹ E.g., McCormick on Evidence (West Pub. 2d Ed.) at p. 149.

reliable, and thus admissible under 49 C.F.R. § 1114.1.

It is not clear that Shad Wisener actually observed any of the factual matters to which he purports to testify, and certainly he did not witness the bulk of the matters. For example, it is crystal clear that he has no observational information whatsoever on matters like PYCO's contracts (see Wisener statement at p. 5) where his allegations are either wrong, irrelevant, or misleading. As to matters of "opinion," Mr. Wisener does not even suggest he has any special experience or expertise qualifying him to offer a reliable opinion on any of the subjects, much less to evaluate what he has been told by his parents, or anyone else. Instead, Mr. Wisener represents himself only as an employee of SAW, and as the son of its owner. No expertise flows from any of that. As a result, Mr. Wisener's statement is a hodge-podge of assertions and allegations for which he is incompetent as a witness. It is not reliable or probative.

3. The Shad Wisener statement is incoherent. There are additional difficulties with the Wisener statement. In some cases, his "opinion" is belied by the very document he presents to support it. For instance, he claims Mr. Lacy's testimony in SAW v. BNSF (Lubbock County Court) "confirms that 'service' was never really an issue" (Shad Wisener statement at p. 1). But Shad Wisener's own Appendix I, transcript at p. 7, shows that Mr. Lacy testified (for example) that PYCO was shipping 25 carloads per day, but SAW then limited PYCO to "only 11 cars a

day in which was not enough to sustain [PYCO's] business." This certainly calls into question SAW's "service." Another example of inherent incoherence in Mr. Wisener's remarks is his discussion of SAW's refusal to deal with Floyd Trucking. On the one hand he suggests Floyd Trucking has no need of rail service, but on the other he suggests Floyd Trucking is constructing a major transload facility in north Lubbock "to take all the aggregate business away from everybody anyway." S. Wisener at 6. Presumably someone would construct a major transload in north Lubbock only because they could not get rail service at their existing transload in SAW's south Lubbock territory.²

Yet another example of incoherence is Shad Wisener's claim that "PYCO testified to the Board that they would not be needing any SAW trackage beyond the 270 day Alternative Service Order." S. Wisener statement at 1. PYCO was and is rail dependent. PYCO's dependency did not and will not change in any foreseeable 270 day period. PYCO filed a FLA seeking to acquire all SAW's trackage on May 5, 2006, in light of SAW's

² Wisener makes a number of other claims about Floyd Trucking. Floyd Trucking advises PYCO's counsel that all are false. In particular, Floyd Trucking carries appropriate liability insurance and can provide certificates and add additional insureds on demand; Mr. Wisener's claim about Floyd's lack of insurance is an after-the-event excuse (Floyd did not hear of the excuse until Mr. Floyd read Wisener's statement). Mr. Floyd has already described draconian or incoherent terms SAW eventually proposed in connection with a track agreement to serve Floyd Trucking on Floyd's own track. See Exhibit H at pp. 7-8 to PYCO's original May 5 FLA, in F.D. 34844, incorporated herein. What SAW tendered Floyd Trucking was not a Santa Fe track agreement as claimed by Shad Wisener, but there is no basis to believe Mr. Wisener competent on that subject anyway.

unrelenting retaliatory conduct and statements.

4. The statement threatens PYCO employees. As the record in F.D. 34802 shows, there have been unrebutted complaints about Shad Wisener's unsafe actions in connection with PYCO's alternative service provider. See PYCO Industries-- Alternative Rail Service -- South Plains Switching, Ltd., F.D. 34802, slip op. at 4 n.12, served Feb. 24, 2006). Mr. Wisener subsequently physically confronted PYCO personnel attempting to prepare the crossing to move cottonseed across SAW trackage to PYCO's plant no. 1 for rail shipment in 2006. In light of Shad Wisener's past physically confrontational conduct, PYCO certainly is concerned about his public threats to Mr. Lacy, and to PYCO personnel generally, about vindicating what Mr. Wisener perceives as SAW's property rights. See S. Wisener statement, p. 5 (top and bottom of page). Such threats are illegitimate discourse even in a forbidden reply to a reply. Here they do not serve any cause other than to reinforce SAW's repeated past threats to shutdown PYCO, or at least make its economic life as miserable as possible, just as SAW has exasperated Floyd Trucking's efforts to obtain rail service³ and just as SAW is endeavoring to drive Hanson Aggregates out of Lubbock.⁴ Mr.

³ See Exhibit H to original PYCO FLA in F.D. 34844 (Floyd Trucking's experience with SAW) and Letter, O.E. Floyd to Secretary, dated July 26, 2006, in Exhibit B to Compilation of Shipper Comments filed 3 August 2006 in F.D. 34890 and related dockets.

⁴ See PYCO Industries -- Feeder Line Application -- Lines of South Plains Switching, Ltd., F.D. 34890, served Jan. 24, 2007 (STB order voiding SAW to Choo Choo transfer of Track 269

Wisener's threats serve to establish the need for alternative rail service for PYCO, and other shippers, and the need for resolution of the feeder line proceeding in favor of PYCO's FLA.

This leads us to the one point on which PYCO agrees with SAW: if SAW is advocating resolution of the FLA proceeding, PYCO of course shares that interest.

But none of the above is a sufficient basis to grant leave to admit into the record Mr. Wisener's incompetent and internally contradictory statement. That statement is replete with errors of fact and otherwise unfounded opinion.⁵ It is neither reliable nor probative. Such replies to replies do not serve to create a "complete record." They serve only to delay and obfuscate. If the Wisener statement were admitted into the record, it should be given no weight and should be disregarded.

Conclusion

SAW's petition for leave to file should be denied.

and SAW's and Choo Choo's attempted cancellations of Hanson's lease of Track 269).

⁵ Failure to respond to Shad Wisener's various assertions should not be read as suggesting that any are true. To the contrary, all Mr. Wisener's remarks appear to be false or misleading. But rather than clutter the record, leave to file should instead be denied.

Respectfully submitted,


Charles H. Montange
for PYCO Industries, Inc.

426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -3739

Of counsel:

Gary McLaren, Esq.
Phillips & McLaren
3305 66th St., Suite 1A
Lubbock, TX 79413
(806) 788-0609
for PYCO Industries, Inc.

Certificate of Service

I hereby certify service of the foregoing Opposition to SAW's "Petition for Leave to File" upon the following counsel of record by express service, next business day delivery, this 29th day of March 2007:

Thomas McFarland, Esq.
208 South LaSalle Street, Suite 1890
Chicago, IL 60606-1112 (for SAW)

William Sippel, Esq
Fletcher & Sippel
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2832 (for US Rail Partners)

John Heffner, Esq.
1920 N Street, N.W., Suite 800
Washington, D.C. 20036 (for WTL)

William A. Mullins, Esq.
Baker & Miller
2401 Pennsylvania Ave. NW, Suite 300
Washington, D.C. 20037 (for Pioneer/KJRY)

Adrian Steel, Esq.
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006-1101 (for BNSF)

Andrew Goldstein, Esq.
McCarthy, Sweeney & Harkaway
2175 K Street, N.W., Suite 600
Washington, D.C. 20037

Michael Hyer, Esq.
Vice President and General Counsel
Hanson North America
300 East John Carpenter Freeway, Suite 1645
Irving, TX 75062

A handwritten signature in black ink, appearing to read "Michael Hyer", written over a horizontal line.